

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROY J. OESER)	
Claimant)	
VS.)	
)	Docket Nos. 1,028,112
)	& 1,028,114
USD 259)	
Self-Insured Respondent)	

ORDER

Claimant appealed the March 1, 2007, Award entered by Administrative Law Judge John D. Clark. The Board placed this appeal on its summary docket for decision without oral argument. The parties, however, did present their written arguments to the Board.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared for claimant. Robert G. Martin and Jennifer M. Hill, both of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On March 19, 1998, claimant slipped and fell at work injuring his right knee.¹ Judge Clark found claimant sustained a 13.5 percent impairment to his right leg, after averaging a 17 percent functional impairment rating to the leg provided by Dr. Peter V. Bieri with a 10 percent impairment rating to the leg provided by Dr. Chris D. Fevurly. But when computing claimant's disability benefits, the Judge awarded claimant benefits for a 13 percent disability rather than a 13.5 percent disability.

¹ The March 19, 1998, accident is the subject of Docket Number 1,028,112.

Claimant sustained a second accident at work on December 11, 2000, when he again slipped and fell at work.² As a result of that accident, claimant injured his low back and underwent a spinal fusion at L3-4. After averaging the functional impairment ratings provided by Dr. Bieri and Dr. Fevurly, Judge Clark awarded claimant permanent disability benefits for a 17.5 percent whole person functional impairment.

Claimant now requests the Board to correct the award for the right knee injury to award claimant disability benefits for the 13.5 percent impairment to the right leg as found by the Judge. Regarding the low back injury, claimant contends he should receive permanent disability benefits for a 25 percent whole person impairment. Claimant argues both Dr. Fevurly and Dr. Bieri arrived at that rating. Moreover, claimant contends that the Award should not be reduced for preexisting impairment for at least three reasons: (1) claimant injured his low back at the L3-4 intervertebral level in the December 2000 accident rather than at the L5-S1 level, which was fused in 1979; (2) there is no evidence claimant had any preexisting injury at the L3-4 disc space and respondent's expert medical witness, Dr. Fevurly, so admitted; and (3) there is no evidence the old injury at L5-S1 created any permanent disability, permanent work restrictions, or affected claimant's daily activities or ability to work.

In summary, claimant requests the Board to correct the computation error for the right knee injury and to increase his permanent partial disability for the low back injury to 25 percent.

Like claimant, respondent asks the Board to affirm the Judge's finding that claimant sustained a 13.5 percent functional impairment to his right leg due to the March 19, 1998, accident. But respondent does not address claimant's request to correct the computation of the permanent disability benefits for that injury.

Regarding the low back injury, respondent requests the Board to adopt Dr. Fevurly's findings that claimant has a 25 percent whole person impairment. Moreover, respondent contends claimant's award should be reduced by 10 percent due to preexisting impairment as his L3-4 fusion "was simply a continuation of the treatment of the degenerative back condition present in the claimant for the past 20 years."³ Accordingly, respondent asks the Board either to award claimant disability benefits for a 15 percent whole person impairment for the December 2000 low back injury or to affirm the Award.

The only issues before the Board on this appeal are:

² The December 11, 2000, accident is the subject of Docket Number 1,028,114.

³ Respondent's Brief at 6 (filed Apr. 24, 2007).

1. What functional impairment did claimant sustain as a result of the December 11, 2000, accident and the resulting low back injury?
2. Should claimant's award of disability benefits for the low back injury be reduced due to preexisting functional impairment?

Regarding the right knee injury, there is not any dispute that the Board should correct the computation of disability benefits for a 13.5 percent disability to the leg. Therefore, the Board shall correct that computation below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds:

As indicated above, the Board shall correct the computation of permanent disability benefits for the right knee injury. Consequently, the remainder of this order will only address the December 11, 2000, accident, which injured claimant's low back.

Claimant teaches high school for the respondent school district. On December 11, 2000, claimant slipped on ice and fell in a school parking lot as he was exiting his truck. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent.

Claimant sought medical treatment following his accident and in April 2003 Dr. Dan Moskowitz fused claimant's low back at the L3-4 intervertebral space. Despite receiving medical treatment, at the November 2006 regular hearing claimant was continuing to experience a right footdrop; numbness in his low back, hip, and buttocks; and intermittent muscle cramping in his low back. Despite having an L5-S1 fusion in 1979, claimant had none of those symptoms and, indeed, performed his work for respondent without restrictions. According to claimant, the doctor who performed his 1979 surgery once wrote a letter on claimant's behalf stating that claimant was in good health for entering the Marine Corps.

Regarding the issue of claimant's permanent disability, the record contains the opinions of two medical experts. Claimant's attorney hired Dr. Peter V. Bieri to evaluate claimant and respondent hired Dr. Chris D. Fevurly for that purpose.

Dr. Bieri, who is board-certified in disability evaluations and who has written sections on impairment in the fifth and sixth editions of the *AMA Guides*,⁴ examined claimant in August 2006. Using the fourth edition of the *AMA Guides*, Dr. Bieri determined claimant had a 25 percent whole person impairment (DRE Lumbosacral Category V) due to the December 11, 2000, accident and resulting fusion at L3-4.

Dr. Bieri did not believe it was appropriate to reduce the impairment for the injury to the L3-4 disc by any preexisting impairment from the earlier injury to the L5-S1 disc as the injuries involved different anatomic sites. Moreover, the results from claimant's clinical exam "were subjectively such that there was no continuing symptomatology or requirement for treatment interventions [for the L5-S1 disc injury] up until and through the time of the subsequent injury."⁵ In short, Dr. Bieri only rated the injury and impairment claimant sustained in his December 2000 accident.

Interestingly, Dr. Bieri's August 4, 2006, medical report indicates claimant had severe spinal stenosis and spondylolysis at L3-4. But no questions were asked if those conditions predated claimant's accident or whether they would comprise an impairment as measured by the *AMA Guides*.

Respondent presented Dr. Fevurly's testimony. Dr. Fevurly, who is board-certified in occupational medicine and internal medicine, examined claimant in September 2006. Dr. Fevurly initially testified claimant had a 20 percent whole person impairment under the *AMA Guides* due to vertebral segmental instability at L3-4 and a preexisting 10 percent whole person impairment due to L5 radiculopathy as evidenced by the right footdrop. Consequently, the doctor concluded claimant sustained an additional 10 percent whole person functional impairment as a result of the December 2000 accident. But when Dr. Fevurly assumed claimant did not have the right L5 radiculopathy and footdrop before the December 2000 accident, the doctor increased claimant's rating to a 25 percent whole person impairment (DRE Lumbosacral Category V), but the doctor held steadfast to his opinion that claimant's preexisting impairment was 10 percent to the whole person. The doctor did not explain how he derived that 10 percent rating without the preexisting radiculopathy.

The Board finds claimant has a 25 percent whole person functional impairment due to his December 2000 accident at work.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁵ Bieri Depo. at 20.

The Board further finds the record fails to establish that claimant had any preexisting functional impairment that should be deducted from claimant's award as provided by K.S.A. 44-501(c). That statute provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Claimant argues the December 2000 accident injured a different area of his low back than what he injured in the late 1970s when he had his L5-S1 vertebrae fused. He also argues he did not have any impairment from that back condition as he was not given any restrictions and worked symptom-free for the two decades following that surgery. Accordingly, claimant contends his award should not be reduced due to any preexisting functional impairment. Respondent, on the other hand, argues that claimant had a degenerative condition in his low back and the L3-4 disc injury is merely a continuation of that disease process. Accordingly, respondent argues, in essence, that it is irrelevant that claimant's most recent low back injury involves a different level of his lumbar spine.

The purpose of K.S.A. 44-501(c) is to avoid the payment of disability benefits for preexisting impairment when a worker aggravates a preexisting condition. And injuries and impairments may be analyzed in different ways. Accordingly, the appropriate test is whether claimant's 25 percent impairment rating includes or incorporates any impairment rating from a prior condition. If so, the award should be reduced. If not, claimant should receive an award of disability benefits without any reduction. Under Dr. Bieri's analysis, the 25 percent rating does not include any impairment rating from a preexisting condition. Under Dr. Fevurly's analysis, it is not so clear.

The Board notes that Dr. Fevurly did not include claimant's right lower extremity radiculopathy, which he initially thought was a preexisting condition, to increase the functional impairment when he first determined claimant had a 20 percent whole person functional impairment. Nonetheless, the doctor thought the 10 percent whole person impairment for that radiculopathy should be deducted to determine the impairment claimant sustained due to the December 2000 accident. The doctor testified, in part:

Then with his current low back impairment, because of the vertebral segmental instability, he has a Category IV DRE impairment That is a 20 percent whole person impairment, but he has a pre-existing impairment due to the fact that he has had a previous fusion there. **He had an L5 radiculopathy at that time with a footdrop and that would have been a 10 percent whole person impairment.** So subtracting the pre-existing impairment from the current impairment would actually be a 10 percent whole person impairment, that would be 20 percent minus

10 percent. That results in an overall 10 percent whole person impairment for his back injury⁶

Dr. Bieri said there was a Category V [presently] existing impairment. In actuality, the radiculopathy that is present has actually been there since 1979-80. Subsequently, I don't think that you can say his current impairment is -- should include an additional kick up for a new or an additional radiculopathy. Subsequently, with the vertebral segmental instability, which is why they did the surgery in 2003, I think that his current impairment is Category IV which is a 20 percent whole person impairment. Then you subtract the 10 percent pre-existing impairment with the radiculopathy.⁷

As indicated above, Dr. Fevurly later indicated claimant had a whole person functional impairment of 25 percent, assuming the right lower extremity radiculopathy did not preexist the December 2000 accident. Considering Dr. Fevurly's testimony in context, the Board finds that his 25 percent whole person functional impairment rating did not include any impairment rating for claimant's earlier L5-S1 fusion.

In conclusion, claimant is entitled to receive disability benefits for a 25 percent whole person impairment due to the December 2000 accident, without any reduction under K.S.A. 44-501(c) for preexisting impairment.

AWARD

WHEREFORE, the Board modifies the March 1, 2007, Award, as follows:

In Docket No. 1,028,112, Roy J. Oeser is granted compensation from USD 259 for a March 19, 1998, accident and resulting disability. Based upon an average weekly wage of at least \$526.50, Mr. Oeser is entitled to receive 27 weeks of permanent partial disability benefits at \$351 per week, or \$9,477, for a 13.5 percent permanent partial disability, making a total award of \$9,477, which is all due and owing less any amounts previously paid.

In Docket No. 1,028,114, Roy J. Oeser is granted compensation from USD 259 for a December 11, 2000, accident and resulting disability. Based upon an average weekly wage of at least \$601.50, Mr. Oeser is entitled to receive 7 weeks of temporary total disability benefits at \$401 per week, or \$2,807, plus 103.75 weeks of permanent partial general disability benefits at \$401 per week, or \$41,603.75, for a 25 percent permanent

⁶ Fevurly Depo. at 13, 14 (emphasis added).

⁷ *Id.* at 15.

partial general disability, making a total award of \$44,410.75, which is all due and owing less any amounts previously paid.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
John D. Clark, Administrative Law Judge